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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SENTINEL OFFENDER SERVICES, LLC,

CASE NO. SACV 14-298-JLS (JPRx)

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS (Doc. 11)**

vs.

G4S SECURE SOLUTIONS (USA), INC.

Defendant.

1 **I. INTRODUCTION**

2 Before the Court is Defendant G4S Secure Solutions (USA) Inc.'s Motion to
3 Dismiss. (Mot., Doc. 11.) Plaintiff Sentinel Offender Services, LLC, opposed, and
4 Defendant replied. (Opp'n, Doc. 15; Reply, Doc. 16.) Having considered the parties'
5 briefing, and having taken the matter under submission, the Court GRANTS IN PART and
6 DENIES IN PART Defendant's Motion.

7
8 **II. BACKGROUND**

9 Sentinel provides privatized offender supervision services and probation services.
10 (Compl. ¶ 7, Doc. 1, Ex. 1.) G4S offers "secure solutions and business processes." (*Id.*
11 ¶ 9.) In the fall of 2011, Sentinel became interested in acquiring G4S Justice Services
12 LLC ("Justice"), which was owned by Defendant G4S, which in turn is owned by G4S plc
13 ("G4S UK"). (*Id.*)

14
15 **A. Sentinel's Acquisition of Justice**

16 On November 21, 2011, Sentinel entered into a written letter of intent with G4S
17 UK, wherein Sentinel proposed to acquire Justice, as well as certain assets of a related
18 company, subject to the completion of due diligence and a mutually agreed Purchase
19 Agreement. (*Id.* ¶ 10.)

20 Between November and December 2011, G4S, G4S UK and Justice uploaded
21 certain documents to a "secure online data room" for Sentinel to review. (*Id.* ¶ 11.) These
22 documents included financial statements and highly redacted copies of Justice's contracts
23 with the fifteen customers who purchased the most goods or services from Justice during
24 2011. (*Id.*) Both during and after Sentinel's review of these documents, Bob Contestabile,
25 Hans Kintsch, and Mark Contestabile, among others at Sentinel, had numerous in person
26 and telephonic meetings and conversations with representatives of G4S and Justice,
27 including Susanne Jorgensen, Chief Financial Officer of G4S Americas, Ian Green, a Vice
28

1 President at G4S, and Blake Beach, the CEO of Justice, regarding the possible acquisition
2 of Justice. (*Id.* ¶ 12.)

3 Based on information and documents provided to Sentinel, a purchase price of \$13
4 million was negotiated. (*Id.* ¶ 13.) On February 22, 2012, counsel for G4S, G4S UK, and
5 Justice sent a draft purchase agreement to Sentinel, which was later revised at least fifteen
6 times. (*Id.* ¶¶ 14-15.) Among the revisions to the initial agreement was the addition of
7 section 1.3, which allows for an adjustment of the purchase price in the event that certain
8 specified contracts with customers of Justice, which were up for re-bid at the time of
9 closing, did not result in the award of a new or extended contract. (*Id.* ¶ 16.) On March 7,
10 2012, representatives of Sentinel expressed concern to representatives of G4S and Justice
11 regarding Justice's contract with the North Carolina Department of Correction, Division of
12 Community Corrections ("NCDOC"), which was up for rebidding, and suggested it be
13 included in section 1.3 of the agreement. (*Id.* ¶ 17.) In response, representatives of
14 Justice, including CEO Blake Beach, assured Bob Contestabile, Hans Kintsch, and Mark
15 Contestabile of Sentinel that the NCDOC contract "won't be a problem" and that "we've
16 got that one." (*Id.*) As a result, the final version of the agreement did not include the
17 NCDOC in section 1.3. (*Id.* ¶ 18.)

18 On April 27, 2012, Sentinel's acquisition of Justice closed. (*Id.* ¶ 20; Agreement,
19 Compl. Ex. A.) Sentinel acquired Justice, as well as certain specified assets from a related
20 entity, for a purchase price of \$13 million, subject to the purchase price adjustments
21 provided in section 1.3. (Compl. ¶ 21.) Article 4 of the agreement contained numerous
22 representations and warranties, which are addressed in the discussion of Sentinel's claims
23 below. Article 7 of the agreement provided that Sentinel may seek indemnification from
24 G4S under certain circumstances and pursuant to certain procedures, which Sentinel
25 alleges to have followed. (*Id.* ¶¶ 46-48.)

1 **B. Loss of the NCDOC Contract**

2 On June 5, 2012, after the closing date of Sentinel's purchase of Justice, Sentinel
 3 discovered during a meeting with the North Carolina Department of Public Safety,
 4 Purchasing and Logistics ("NCDPS") that the NCDOC contract would not be renewed.
 5 (*Id.* ¶ 35.) On June 6, 2012, Sentinel received a letter from NCDPS stating that the
 6 contract would not be renewed because the request for proposal previously submitted by
 7 Justice did not meet the following three requirements: (1) provision of offender monitoring
 8 PC software compatible with Internet Explorer version 7; (2) provision of GPS tracking
 9 software capable of supporting more than 1,000 devices and establishing more than 100
 10 exclusion zones; (3) provision of electronic monitoring equipment with a "minimum
 11 internal operating battery life of at least 48 hours with maximum recharge time of 4 hours
 12 per day." (*Id.* ¶¶ 36, 37; *Id.* Ex. B.)

13 On June 8, 2012, the NCDOC formally awarded the contract to BI, Inc. (*Id.* ¶ 39.)
 14

15 **C. Alleged Concealment of Facts**

16 Following the June 6, 2012 letter and the June 8, 2012 bid award, Sentinel
 17 conducted an investigation of Justice's records and files, including emails and
 18 correspondence that it alleges had not been known or accessible to it prior to closing. (*Id.*
 19 ¶ 40.) Based on Sentinel's investigation, it discovered the facts set forth below.

20 On August 5, 2011, the NCDOC notified Justice that its existing contract would
 21 expire on March 31, 2012, and that Justice would have to submit a new bid. (*Id.* ¶ 42(a).)
 22 On August 16, 2011, the NCDOC issued a Request for Proposal, amended by an October
 23 4, 2011 addendum, which included the three requirements identified above regarding
 24 (1) use of Internet Explorer version 7; (2) GPS tracking software capabilities; and (3)
 25 battery life and battery recharge time. (*See id.* ¶¶ 37, 42(b),(c).) The October 4, 2011
 26 addendum stated that "[a]ll proposals will be evaluated and classified as responsive or non-
 27 responsive. If non-responsive, [the] proposal will not be considered further. To be
 28

1 eligible, [the proposal] must meet the intent of all requirements . . . [A] serious deficiency
 2 in the response to any one factor may be grounds for rejection regardless of overall score.”
 3 (*Id.* ¶ 42(c) (emphasis in Complaint; third alteration in Complaint)).

4 In the fall of 2011, prior to Justice’s bid submission, Justice exchanged emails with
 5 its vendor, 3M Electronic Monitoring, regarding the NCDOC’s bid requirements. (*Id.*
 6 ¶ 42(d).) On September 12, 2011, Melissa O’Keefe, a Vice President at 3M, emailed Mike
 7 Dean and Leo Carson, both Vice Presidents at Justice, highlighting five functional areas
 8 where 3M’s software and field monitoring equipment did not meet the requirements of the
 9 Request for Proposal. (*Id.*) On November 10, 2011, Justice submitted its NCDOC bid
 10 proposal, which included admissions that its proposed monitoring software was not
 11 compatible with Internet Explorer version 7, as required by the Request for Proposal. (*Id.*
 12 ¶ 42(e).)

13 By letter dated January 18, 2012 from a purchasing agent at the NCDOC to Leo
 14 Carson, the NCDOC requested clarification as to several aspects of Justice’s proposal. (*Id.*
 15 ¶ 42(f).) The letter, which is not attached to the Complaint, stated in part:

17 3. On pages 18 and 21 [Justice’s] response states that the
 18 offender management software can be used with Internet
 19 Explorer Version 8 or Firefox version 3.6 browsers.

20 4. Is the proposed offender management software compatible
 21 with NCDOC’s current environment which uses Internet
 22 Explorer Version 7 ? Yes or No? [. . .]

23 14. Page 18 and 21: The Web Based system works with
 24 Internet Explorer 8 or Firefox 3.6. The NCDOC uses Explorer
 25 7 will the system work with this version Yes or No? [. . .]

26 16. Page 89; i, Establish exclusion zones around all Primary
 27 and Second schools in North Carolina. Will your system
 28

1 allow exclusion zones around ALL? Yes or No? Response
2 indicates that the ability to create zones has limitation and the
3 total number is 100 [. . .]

4 17. Page 100: Per Addendum the battery life must be at least
5 48 hours. Response indicates up to 48 and there is conflicting
6 info in previous sections that the battery life is 24 hours
7 depending on the mode. Is the battery life at least 48 hours
8 charge time? Yes or No?[]

9
10 (*Id.*)

11 On January 27, 2012, Carson emailed a copy of the letter to 3M and requested
12 assistance in responding to the NCDOC. (*Id.* ¶ 42(g).) O’Keefe replied that the 3M
13 software and equipment proposed in the Justice bid (1) did not meet the Internet Explorer
14 version 7 compatibility specification; (2) did not meet the GPS exclusion zone
15 specification; and (3) did not meet the specification for minimum battery life. (*Id.*)
16 Carson forwarded the response to a number of Justice employees, including Mike Dean,
17 expressing concern and asking for “thoughts and insights on how to respond[.]” (*Id.*)

18 On January 30, 2012, Carson emailed O’Keefe, advising her that Justice “is
19 genuinely concerned that these 3M items render our proposal non-compliant with the
20 NCDOC RFP requirements” and requested that she investigate the issues. (*Id.* ¶ 42(h).)
21 O’Keefe responded by confirming the 3M software and equipment did not meet the
22 requirements of the Request for Proposal. (*Id.*)

23 On June 31, 2012, Carson emailed Darryl Martin and Mike Dean of Justice, stating
24 that “we face exposure for potential non-compliance” with the three above-identified
25 requirements of the Request for Proposal. (*Id.* ¶ 42(i).) Later that day, Carson emailed and
26 faxed a response to the NCDOC confirming that Justice’s proposal did not comply with
27 these three requirements. (*Id.* ¶ 42(j).)

1
2 **D. Present Action**

3 On January 3, 2014, following an unsuccessful attempt to obtain indemnification
4 from G4S under the terms of the agreement, Sentinel filed the present action. (Compl.)¹
5 Sentinel brings claims for (1) breach of representations and warranties in purchase
6 agreement; (2) breach of written contract; (3) fraud and deceit; (4) negligent
7 misrepresentation; and (5) constructive fraud. (*Id.* at 17-34.)
8

9 **III. LEGAL STANDARD**

10 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
11 sufficiency of the claims asserted in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662,
12 678-79 (2009). When evaluating a motion to dismiss under Federal Rule of Civil
13 Procedure 12(b)(6), the Court must accept as true all allegations of material facts that are
14 in the complaint and must construe all inferences in the light most favorable to the non-
15 moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). Dismissal of a
16 complaint for failure to state a claim is not proper where a plaintiff has alleged “enough
17 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550
18 U.S. 544, 570 (2007). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires
19 only “a short and plain statement of the claim showing that the pleader is entitled to relief.”
20 Fed. R. Civ. P. 8(a)(2). “However, where a complaint includes allegations of
21 fraud, Federal Rule of Civil Procedure 9(b) requires more specificity[,] including an
22 account of the ‘time, place, and specific content of the false representations as well as the
23 identities of the parties to the misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756,
24

25 ¹ The action was originally filed in Orange County Superior Court. G4S was served on January
26 30, 2014 and timely removed the action on February 28, 2014. (Notice of Removal at 2, Doc. 1.)
27 This Court has diversity jurisdiction, as the parties are citizens of different states, and the amount
28 in controversy exceeds \$75,000. (Compl. ¶¶ 1-2; *id.* at 34-35.)

1 764 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.
 2 2004)). “A pleading is sufficient under rule 9(b) if it identifies the circumstances
 3 constituting fraud so that a defendant can prepare an adequate answer from the
 4 allegations.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

6 **IV. DISCUSSION**

7 G4S moves to dismiss all of Sentinel’s claims, as well as Sentinel’s request for
 8 punitive damages. The Court addresses each claim in turn, followed by the request for
 9 punitive damages.

11 **A. Claim for Breach of Representations and Warranties in Purchase** 12 **Agreement**

13 Sentinel’s first claim is for breach of certain representations and warranties in
 14 Article 4 of the agreement. The Court finds that Sentinel plausibly alleges a breach of the
 15 representations and warranties in section 4.25(a)(ii) of the agreement. Sentinel also
 16 plausibly alleges a breach of the two “catch-all” representations and warranties in the
 17 agreement—section 4.23 and the first unnumbered paragraph of Article 4—based on the
 18 representations and warranties in sections 4.25(a)(i) and 4.25(a)(ii) of the agreement.

19 In section 4.25(a)(i) of the agreement, G4S represented that “all Material Customers
 20 continue to be customers of Justice and no Material Customer has materially reduced or
 21 disclosed² an intention to materially reduce its business with Justice below the levels
 22 achieved during [2011].” (Compl. ¶ 52(d); Agreement § 4.25(a)(i).) In section 4.25(a)(ii)
 23 of the agreement, G4S represented that “no Material Customer has terminated its

25 ² Sentinel’s Complaint and Opposition systematically misquote and misrepresent this section as
 26 merely requiring the NCDOC “indicate,” rather than “disclose,” an intention to materially reduce
 27 its business with Justice. Sentinel is advised that similar misrepresentations in the future may
 28 result in sanctions.

1 relationship with Justice or has threatened to do so.” (Compl. ¶ 52(e); Agreement
2 § 4.25(a)(ii).) The agreement lists the NCDOC as a “Material Customer.” (Agreement
3 § 4.25(a); Agreement Disclosure Schedule 4.25.) G4S argues that the NCDOC’s January
4 18, 2012 letter does not demonstrate that the NCDOC “disclosed an intention to materially
5 reduce its business with Justice” or that the NCDOC “threatened” to terminate its
6 relationship with Justice, because the letter “requested clarification.” (Mem. at 8-9;
7 Compl. ¶ 42(f).) Construing all inferences in a light most favorable to Sentinel, the Court
8 finds the letter could be plausibly considered a “threat” to terminate the relationship,
9 particularly given the NCDOC’s October 4, 2011 statement regarding the possible
10 consequences of failing to comply with the requirements of the Request for Proposal.
11 Thus, Sentinel plausibly alleges a breach of the representations and warranties in
12 section 4.25(a)(ii).

13 Sentinel also plausibly alleges a breach of the representations and warranties in
14 section 4.23 and the first unnumbered paragraph of Article 4, based on the representations
15 and warranties in sections 4.25(a)(i) and 4.25(a)(ii). Pursuant to section 4.23 of the
16 agreement, G4S represented that “[t]he representations and warranties contained in this
17 Article 4 do not contain any untrue statement of material fact or omit to state any material
18 fact necessary to make the statements and information contained in this Article 4 not
19 misleading.” (Compl. ¶ 52(h); Agreement § 4.23.) Pursuant to the first unnumbered
20 paragraph of Article 4, G4S “represent[ed] and warrant[ed] to [Sentinel] that the
21 statements contained in this Article 4 are correct and complete as of the Closing Date.”
22 (Compl. ¶ 52(g); Agreement at 8.) Because section 4.23 uses the term “misleading,” a
23 misrepresentation may exist as to section 4.23 based on the omission of a material fact that
24 renders a specific representation elsewhere in the agreement misleading, even if that other
25 representation is not false *per se*. Inasmuch as an omitted material fact would make a
26 specific representation “misleading” under section 4.23, it would also render the
27 statements made in connection with that representation not “complete” pursuant to the first
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1 unnumbered paragraph of Article 4. Construing all inferences in a light most favorable to
2 Sentinel, the Court finds that Sentinel plausibly alleges it was “misleading” to represent
3 that the NCDOC had not “threatened” to terminate its relationship with Justice and had not
4 “disclosed an intention to materially reduce its business with Justice,” without also
5 disclosing (1) the NCDOC’s October 4, 2011 statement regarding bid requirements; (2) the
6 NCDOC’s January 18, 2012 letter; and (3) Justice’s January 31, 2012 response. (Compl.
7 ¶¶ 54(a)-(e).) For the same reasons, the statements made to Sentinel could plausibly be
8 considered not “complete” pursuant to the first unnumbered paragraph of Article 4.
9 Sentinel also plausibly alleges that these undisclosed facts are “material;” whether they
10 actually are material presents a factual question that is inappropriate to resolve at this
11 stage. *See Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 n.7 (9th Cir. 2013) (“[T]he
12 materiality of a misrepresentation is typically an issue of fact, and therefore should not be
13 decided at the motion to dismiss stage.”); *Persson v. Smart Inventions, Inc.*, 125 Cal. App.
14 4th 1141, 1163 (Ct. App. 2005) (“Materiality is a question of fact for the jury, unless the
15 fact misrepresented is so obviously unimportant that the jury could not reasonably find that
16 a reasonable man would have been influenced by it.”) (quotation marks omitted).

17
18 **B. Claim for Breach of Written Contract**

19 Sentinel’s claim for breach of written contract is based on (1) breach of the
20 representations and warranties identified above; (2) breach of the implied covenant of good
21 faith and fair dealing; and (3) breach of the terms and conditions set forth in Article 7 of
22 the agreement, which allow Sentinel to seek indemnification from G4S under certain
23 circumstances. (Compl. ¶ 63.) Inasmuch as Sentinel states a claim for breach of
24 representations and warranties in the agreement, Sentinel also states a claim for breach of
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1 written contract. For the same reasons, Sentinel states a claim for breach of contract based
2 on G4S's failure to indemnify under Article 7.³

3 As to the breach of implied covenant claim, "[t]he covenant of good faith and fair
4 dealing, implied by law in every contract, exists merely to prevent one contracting party
5 from unfairly frustrating the other party's right to receive the *benefits of the agreement*
6 *actually made.*" *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349 (Cal. 2000) (citation
7 omitted). "It cannot impose substantive duties or limits on the contracting parties beyond
8 those incorporated in the specific terms of their agreement." *Id.* at 349-50. At the same
9 time, "[t]o the extent the implied covenant claim seeks simply to invoke terms to which the
10 parties *did* agree, it is superfluous." *Id.* at 352. Further, a claim for breach of the implied
11 covenant of good faith and fair dealing cannot be based on non-disclosure or concealment
12 prior to the closing date of the contract. *See McClain v. Octagon Plaza, LLC*, 159 Cal.
13 App. 4th 784, 799 (Ct. App. 2008).

14 To the extent Sentinel's breach of implied covenant claim is premised on the
15 NCDOC contract not being renewed, it fails, because the parties' extensively-negotiated
16 contract did not include the NCDOC in section 1.3, which allows for an adjustment of the
17 purchase price in the event that certain identified contracts with customers of Justice did
18 not result in the award of a new or extended contract. *See Guz*, 24 Cal. 4th at 349. To the
19 extent this claim is based on a failure to disclose information as part of the negotiation
20 process prior to closing, it also fails. *See McClain*, 159 Cal. App. 4th at 799. To the extent
21 this claim is based on a breach of specific sections of the agreement, it is superfluous with
22 the claim for breach of express and implied warranties as well as the claim for breach of
23 written contract. *See Guz*, 24 Cal. 4th at 352. Accordingly, Sentinel fails to state a claim
24 for breach of the implied covenant of good faith and fair dealing.

25
26
27 ³ G4S does not argue for dismissal of this portion of the claim.
28

1 **C. Claims for Fraud and Negligent Misrepresentation**

2 Sentinel’s claims for fraud and negligent misrepresentation are based on the same
3 representations and warranties that form a basis for its claim for breach of representations
4 and warranties. (*Compare* Compl. ¶¶ 52, 54 *with id.* ¶¶ 69-70, 77, 79.)

5 A fraud claim requires “(1) a misrepresentation (false representation, concealment,
6 or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to
7 induce reliance; (4) justifiable reliance; and (5) resulting damage.” *Robinson Helicopter*
8 *Co. v. Dana Corp.*, 34 Cal. 4th 979, 990 (Cal. 2004) (citations omitted). A claim for
9 negligent misrepresentation requires “(1) the misrepresentation of a past or existing
10 material fact, (2) without reasonable ground for believing it to be true, (3) with intent to
11 induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the
12 misrepresentation, and (5) resulting damage.” *Wells Fargo Bank, N.A. v. FSI, Fin.*
13 *Solutions, Inc.*, 196 Cal. App. 4th 1559, 1573 (Cal. 2011) (citations and quotation marks
14 omitted).

15 For the reasons stated above, Sentinel plausibly alleges the representations and
16 warranties in section 4.25(a)(ii) were false. Sentinel also plausibly alleges the
17 representations and warranties in section 4.23 and the first unnumbered paragraph of
18 Article 4 were false, based on the factual omissions necessary to make the representations
19 and warranties in sections 4.25(a)(i) and 4.25(a)(ii) complete and not misleading. In
20 addition, Sentinel alleges knowledge of falsity (or, in the alternative, no reasonable ground
21 for believing the representation to be true), intent to induce reliance, justifiable reliance,
22 and damages. (*See* Compl. ¶¶ 70-75, 79-82.)⁴ The Court further finds that Sentinel’s fraud
23

24 ⁴ As Sentinel has adequately pleaded reliance, the Court need not address at this stage whether
25 section 7.3(f) of the Agreement, which provides that “[n]o Indemnified Person’s rights under this
26 Agreement will be adversely affected by . . . any knowledge acquired or capable of being
27 acquired, by such Indemnified Person at any time,” means that Sentinel need not establish
28 reasonable reliance as an element of its fraud or negligent misrepresentation claims. (*See* Opp’n at
23; Reply at 11-12.)

1 claim meets the heightened pleading standard of Rule 9(b), as it alleges in detail what
2 information G4S did and did not disclose, when disclosures were made, and to whom they
3 were made. Without deciding whether Rule 9(b) applies to Sentinel's negligent
4 misrepresentation claim, the Court finds that the claim would also meet the heightened
5 pleading standard for the same reasons.

6 Sentinel also plausibly alleges fraudulent omissions of the facts identified above.
7 "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances:
8 (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive
9 knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when
10 the defendant actively conceals a material fact from the plaintiff; and (4) when the
11 defendant makes partial representations that are misleading because some other material
12 fact has not been disclosed." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255 (Ct.
13 App. 2011). When there is no fiduciary relationship, "the duty to disclose generally
14 presupposes a relationship grounded in "some sort of *transaction* between the parties.
15 Thus, a duty to disclose may arise from the relationship between seller and buyer,
16 employer and prospective employee, doctor and patient, or parties entering into any kind
17 of contractual agreement." *OCM Principal Opportunities Fund v. CIBC World Markets*
18 *Corp.*, 157 Cal. App. 4th 835, 851 (Ct. App. 2007) (citations omitted).

19 As to (1), no fiduciary duty is alleged. Sentinel argues that G4S had a contractual
20 duty to disclose the omitted facts discussed above pursuant to section 4.23 of the
21 agreement. (Opp'n at 19-20. *See* Agreement § 4.23 ("The representations and warranties
22 contained in this Article 4 do not . . . omit to state any material fact necessary to make the
23 statements and information contained in this Article 4 not misleading.").) G4S does not
24 address this argument, and the Court finds that section 4.23 gives rise to a duty to disclose
25 the omitted facts discussed above.

26 As to (2)—exclusive knowledge by defendant of material facts not known or
27 reasonably accessible to plaintiff—Sentinel alleges it "did not have access to the records
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1 and documents containing such information.” (Compl. ¶¶ 70(i), 79(i).) While Sentinel
 2 does allege G4S provided it with access to some documents, including “highly redacted
 3 copies of Justice’s contract[.]” with the NCDOC, (*id.* ¶ 11), nothing further is alleged as to
 4 what information was or was not accessible. Drawing all reasonable inferences in
 5 Sentinel’s favor, the Court finds Sentinel plausibly alleges that the omitted facts discussed
 6 above were not “reasonably accessible” to Sentinel. Whether or not such information was
 7 actually “reasonably accessible” presents a factual question that is inappropriate to resolve
 8 at this stage. *See Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 295(Ct.
 9 App. 2004).

10 As to (3)—active concealment—“active concealment may exist where a party
 11 [w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes
 12 misleading statements or suppresses facts which materially qualify those stated.” *Id.* at
 13 294 (quotation marks omitted; alteration in original). “Mere nondisclosure does not
 14 constitute active concealment. Rather, to state a claim for active concealment, Plaintiff
 15 must allege specific affirmative acts on the part of the [D]efendants in hiding, concealing
 16 or covering up the matters complained of.” *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d
 17 1161, 1176 (E.D. Cal. 2013) (citations and quotation marks omitted, alteration in original).
 18 Sentinel alleges that on March 7, 2012, it “expressed concern” with the NCDOC contract
 19 and suggested the NCDOC be included in the price adjustment provision in section 1.3.
 20 (Compl. ¶ 17.) In response, Justice’s CEO, Blake Beach, stated that the NCDOC contract
 21 “won’t be a problem” and “we’ve got that one.” (Compl. ¶ 17.) As a result, the NCDOC
 22 was not included in section 1.3. (*Id.* ¶ 18.) G4S argues that the statements made by Beach
 23 are opinions, which ordinarily do not give rise to a claim for fraud in and of themselves.
 24 *See Nibbi Bros., Inc. v. Home Fed. Sav. & Loan Ass’n*, 205 Cal. App. 3d 1415, 1423 (Ct.
 25 App. 1988). However, G4S cites no authority that these statements, even if opinions,⁵

26
 27 ⁵ As the Court does not have the complete context for the statements, the Court does not decide in
 28 this Order whether or not they are opinions.

1 could not support a finding of active concealment of other information that is indisputably
2 factual. Based on the above allegations, the Court finds that Sentinel has adequately
3 alleged active concealment.

4 As to (4)—partial representations that are misleading because some other material
5 fact has not been disclosed—Sentinel argues that once G4S made “extensive warranties
6 and representations and accompanying disclosure schedules concerning the relationship of
7 Justice with [the NCDOC],” it had a duty to disclose all material facts related to the
8 NCDOC. (Opp’n at 20-21.) For the reasons stated above, Sentinel plausibly alleges it was
9 misleading for G4S to make the representations and warranties in 4.25(a)(i) and 4.25(a)(ii)
10 while omitting the facts identified above.

11 12 **D. Claim for Constructive Fraud**

13 Sentinel does not oppose dismissal of this claim. (Opp’n at 24.) Accordingly, the
14 claim is DISMISSED WITH PREJUDICE.

15 16 **E. Request for Punitive Damages**

17 G4S argues that the agreement prohibits recovery of punitive damages, and
18 therefore Sentinel’s request for punitive damages should be dismissed. (Mem. at 18.) G4S
19 further argues that the request for punitive damages is insufficiently pleaded. (*Id.*)
20 Sentinel’s allegations as to punitive damages are as follows: “[i]n performing the acts
21 herein alleged, G4S acted fraudulently, despicably and in willful and conscious disregard
22 of Sentinel’s rights and/or intentionally made the misrepresentations and omissions of
23 material fact described herein, for the purpose of depriving Sentinel of money and
24 property, thereby justifying an award of punitive damages against G4S.” (Compl. ¶ 75.)
25 Sentinel essentially admits its allegations in support of punitive damages are conclusory,
26 but it argues that conclusory allegations are sufficient, citing pre-*Twombly* decisions.
27 (Opp’n at 24-25.) Post-*Twombly*, however, a plaintiff must make more than conclusory
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1 allegations as to punitive damages. *See Diehl v. Starbucks Corp.*, No. 12CV2432 AJB
2 (BGS), 2014 WL 295468, at *8, *14 (S.D. Cal. Jan. 27, 2014) (finding fraud claims
3 sufficiently pleaded, but conclusory allegations as to punitive damages were insufficient).

4 Thus, Sentinel's allegations in support of punitive damages are insufficiently
5 pleaded, and the punitive damages claim is DISMISSED WITHOUT PREJUDICE.
6 Unless and until Sentinel can provide sufficient factual allegations supporting its request
7 for punitive damages, the Court will not decide whether punitive damages are barred under
8 the Agreement.

9
10 **V. CONCLUSION**

11 For the foregoing reasons, Defendant's Motion is GRANTED IN PART and
12 DENIED IN PART. Sentinel's claim for breach of the implied covenant of good faith and
13 fair dealing is DISMISSED WITHOUT PREJUDICE. The Motion is DENIED as to the
14 claims for breach of representations and warranties, breach of written contract, fraud, and
15 negligent misrepresentation. The constructive fraud claim is DISMISSED WITH
16 PREJUDICE. The request for punitive damages is DISMISSED WITHOUT PREJUDICE.
17 Any amended pleading must be filed within **21 days** of the date of this Order.

18
19 **SO ORDERED.**

20
21 DATED: June 3, 2014

22 JOSEPHINE L. STATON
23 HONORABLE JOSEPHINE L. STATON
24 UNITED STATES DISTRICT JUDGE
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